

Rule of Law and Stability Operations: A Tale of Two Conferences



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BACKGROUND

U.S. engagements in Afghanistan, Iraq, and other areas have highlighted the fact that the armed forces often will be required to rebuild the infrastructure and institutions of failed and rogue states after an armed intervention. One important area of reconstruction in which deployed military personnel have had to engage is what is generally termed “rule of law.” As they develop their understanding of stability operations, military departments are attempting to understand what constitutes rule of law and how they can perform effective operations to promote the rule of law. Two recent conferences addressed the military’s evolving theory and practice of rule of law operations.



TJAGLCS, Charlottesville VA

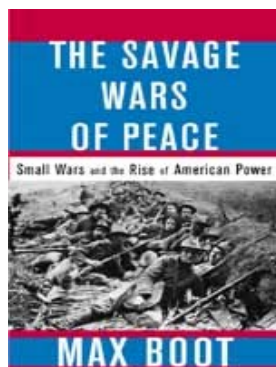
On 25-26 September 2006, Colonel David Gordon and Professor Hank Nichols from the Security and Rule of Law Reform Directorate of the Peacekeeping and Stability Operations Institute (PKSOI) attended a seminar entitled “Implementing the Rule of Law and Human Rights in Stability Operations,” which was jointly sponsored by the Carr Center for Human Rights Policy at Harvard University and the U.S. Army Judge Advocate General’s Legal Center and School (TJAGLCS). The seminar was held at the TJAGLCS facility in Charlottesville, VA. The participants consisted of some military personnel, but most were representatives of civilian academic, private, and governmental organizations.

On 16-20 October 2006, COL Gordon directed the 3d Rule of Law Operations Workshop (ROLOW) at Ft. Bragg, NC. This program was jointly sponsored by the U.S. Army Civil Affairs and Psychological Operations Command (Airborne) (USACAPOC(A)) and PKSOI of the Center for Strategic Leadership at the Army War College, and was designed to train Civil Affairs judge advocates to perform rule of law operations overseas. In the military, Rule of Law is a Civil Affairs Functional Specialty area which includes judge advocates and Civil Affairs specialists in related subjects. The

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participants in this workshop were primarily military judge advocates, most of whom are assigned to USACAPOC (A), with some representation from Department of State, Department of Justice, and USAID.

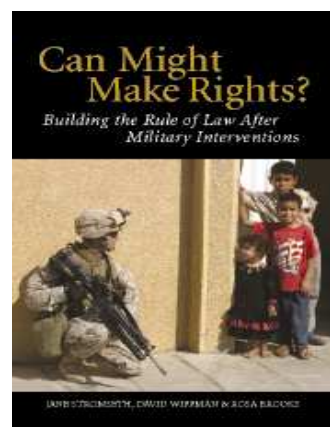
DISCUSSION



The intent of the Charlottesville seminar was to “advance critical thought on successful rule of law missions that integrate relevant human rights and legal norms in sustainable terms.” Aimed to examine rule of law issues at the strategic level, the program was organized in five panels. The first panel outlined the relevant legal frameworks for stability operations and identified operative restraints and mandates. The second panel provided an historical review of past operations. The third panel focused on contemporary US operations, and the fourth on multilateral operations. The final panel offered principles and guidelines for the

future.

The panelists included noted academicians, such as Dr. Max Boot, author of *The Savage Wars of Peace*, and Prof. Rosa Brooks, one of the co-authors of *Can Might Make Rights? Building the Rule of Law after Military Interventions*. Other panelists were Prof. Michael Newton of the Vanderbilt University School of Law, Mr. Robert Perito of the U.S. Institute of Peace, Mr. Charles Allen of the DoD Office of the General Counsel, Mr. Michael Posner of Human Rights First, Ms. Cathy Niarchos from USAID, Ambassador Robert Oakley of the National Defense University, and Mr. Scott Carlson, a noted writer and consultant with Chemonics, Inc. Major General Scott Black, the Judge Advocate General of the Army, gave a luncheon speech on the importance of rule of law and the need for judge advocates to be actively engaged in this important process. The most striking aspect of the entire conference was the wide spectrum of concepts, nuances, and concerns that the participants considered to be essential to rule of law. The discussion ranged from very ideological expositions of human rights to very pragmatic issues of making police and court systems operational.



By contrast, Ft. Bragg’s ROLOW sought to train judge advocates in the practical knowledge, skills, and abilities needed to perform rule of law operations while deployed to Afghanistan, Iraq, and other post-conflict environments, and was geared primarily to the tactical and operational levels. The program had three major focus areas:

a. the conceptual framework of rule of law operations—what rule of law is, why it is important to stability operations, and the ends we want to reach by conducting rule of law operations;

b. the legal disciplines necessary to carry out rule of law operations—international law, human rights law, and comparative law (to include specific legal traditions and systems); and,

c. the practical ways and means to plan and execute rule of law operations, to include U.S. law of funding humanitarian and reconstruction operations, coordination of rule of law activities with U.S., international, and host nation participants, and integration of police, judicial, legal reform, corrections, and information activities into a coherent and synergistic program to achieve the desired ends.

Among the instructors were Dr. Frank E. Vogel, the Director of the Islamic Legal Studies Seminar at Harvard Law School, Dr. Quadir Amiryar of George Washington Law School and Kabul University, LTC Kevin Govern of the U.S. Military Academy Law Department, MAJ Sean Watts of TJAGLCS, Mr. Darrell Phillips and Capt. Kevin Ingram of The Air Force Judge Advocate General's School, Mr.

Dan Donovan of the legal office of Joint Forces Command, and representatives of other U.S. agencies involved in rule of law operations, including Ms. Melanne Civic (Department of State, Office of the Coordinator for Stability and Reconstruction), Mr. Jared Fishman (Department of State, Bureau for International Narcotics and Law Enforcement Affairs), Mr. Judd Ray and Mr. William Lantz (Department of Justice), and Mr. Alex Berg (US Agency for International Development). COL Gordon and Prof. Nichols of PKSOI, and COL Christine Stark, formerly of PKSOI, also made presentations. The program topics were selected based on the experiences of civil affairs military lawyers who have engaged in rule of law operations in Afghanistan and Iraq, and were designed to fill critical gaps in knowledge and skills identified by those practitioners.



Islamic Law Panel: Dr. Amiryar, Dr. Vogel, LTC Govern

OBSERVATIONS

While “Rule of Law” figures prominently in the titles of both these events, there was little to no overlap in the two programs. One reason for this situation is that the phrase “rule of law,” although often cited as being a very important strategic goal of the United States, is a term that is fraught with ambiguity; indeed, while the term “rule of law” is found multiple times in the National Security Strategy, the National Security Presidential Directive 44 (NSPD-44), Department of Defense (DoD) Directive 3000.05, and other

documents relating to stability operations, the term is not defined in any of those documents. Attempting to define what is meant by “rule of law” is a cottage industry for many academic writers.

This ambiguity was often reflected in the discussions at the Charlottesville seminar. Many of the participants at Charlottesville represented various sorts of human rights organizations, and their focus appeared to be the treatment afforded detainees and others by U.S. forces. “Rule of law,” in this context, is couched in terms of Abu Gharib and Guantanamo, and expresses a concern as to whether the U.S. forces comply with the human rights norms advocated by the various organizations.

An alternative view is that “rule of law” is a principle of governance which pertains to the functioning of the legal and public safety systems in a formerly failed state like Afghanistan or a former rogue state like Iraq. Although some attention at Charlottesville was given to envisioning the end state desired for a host nation legal system and determining the steps needed to achieve that end state, “rule of law” was viewed by the bulk of the participants as an issue pertaining to the conduct of the intervening forces during a stability operation, not as a core program of the interveners’ efforts to produce stability.

Human rights compliance by U.S. and coalition forces is important for establishing a host nation cultural norm of compliance with the law—one cannot teach what one does not practice. Under DoD Directive 3000.05, the U.S. military has the mission of restoring, reforming, and increasing the capacity of the host nation’s institutions to enhance its stability. Rule of law operations are an essential element of this stability mission.



COL Gordon teaching at the Ft. Bragg ROLOW

The ROLOW was designed to train deploying practitioners in directly applicable knowledge and skills for rule of law operations. The ROLOW placed its emphasis on “rule of law operations,” rather than “rule of law.” This emphasis reflects the very pragmatic need of military practitioners to do actions that bring about effects which fulfill the military mission.

The ROLOW expressed and developed the concept of rule of law operations using the terminology of the new FM 3-05.40, *Civil Affairs Operations* (September 2006). In both the Field Manual and the Workshop, there was no attempt to define “rule of law;” the closest either comes to a definition is a phrase in the FM which states that “Rule of law pertains to the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections systems.”

Even the phrase “rule of law operations” was not given a specific definition, but was expressed in terms of a purpose, a goal, and examples. The *purpose* of rule of law operations is “to create security and stability for the civilian population by restoring and enhancing the effective and fair administration and enforcement of justice.” The *goal* of rule of law operations is to develop a host nation legal system that is effective, efficient, legitimate in terms of the host nation culture and legal tradition, and acceptable internationally. *Examples* of rule of law operations include: restoration of order in the immediate aftermath of military operations; adopting transitional measures for the immediate administration of justice; reestablishing routine police functions; restoring and enhancing the operation of the court system; restoring and reforming the host nation civil and criminal legal systems; and, providing for an effective corrections system that complies with international standards.

This approach was intended to ensure that the person attempting to perform a rule of law operation does not artificially limit his or her analysis of the problem to that which fits within a black letter definition. One significant problem with settling on a precise definition is that definitions can limit conceptualization, and can thereby preclude consideration of courses of action which may bring about the desired result. The courses of action that may be considered should not be constrained by whether or not they “constitute ‘rule of law’.” Rule of law is a developing field for the academy, the civilian agencies, and the military, and open-ended, operational definitions can facilitate that development.

CONCLUSION

It is not necessary to resolve the ambiguity in the definitions of “rule of law” reflected by the Charlottesville seminar to carry out effective rule of law operations, and it is probably in everyone’s best interest if the term is left with competing definitions. It is helpful for the operator to consider the various proffered definitions and the ramifications thereof. Certainly, the conduct of U.S. forces affects the perception that people of the host nation have of us and the ideas we offer them. Understanding how various international academicians, non-governmental organizations, and coalition partners understand and advance their human rights agendas is important to ensuring that U.S. efforts to promote stability are as synergistic as possible with the efforts of those actors. While the various theoretical definitions are useful in analyzing a problem, an exhaustive definition does not have to be adopted *a priori* to conduct effective rule of law operations. The pragmatic approach of the ROLOW allows the practitioners to articulate the desired end state, then develop the techniques, tactics and procedures needed to reach that result, regardless of which of the theoretical definitions of “rule of law” one advocates.

This and other PKSOI publications can be found on the USAWC/PKSOI site at <http://www.carlisle.army.mil/usacsl/IPapers.asp>.

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